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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-331, 76-332, 76-336

No. 76-331

NORTH CAROLINA UTILITIES COMMISSION, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

No. 76-332

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

No. 76-336

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AERONAUTICAL RADIO, INC., AND AIR TRANSPORT ASSOCIATION OF AMERICA

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OPINIONS BELOW

The decision of the Court of Appeals appears at 537 F.2d 787 and is reprinted as Appendix A of each of the petitions. The Court of Appeals affirmed the decision of the Federal Communications Commission (FCC), 45 F.C.C.2d 204, which is reprinted as Appendix B to each of the petitions.

JURISDICTION

Petitioners seek review by this Court pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

Aeronautical Radio, Inc. (ARINC) and the Air Transport Association of America (ATA) adopt and hereby incorporate the statement of the Question Presented appearing in the Brief of the Federal Communications Commission and the United States of America in Opposition (Government Brief).

STATEMENT

Rather than detail the procedural history of this case, ARINC and ATA adopt the Statement appearing in the Government Brief.[1] In addition, ARINC and ATA wish to supplement that Statement with a description of how long-standing FCC policies, affirmed in the decision below, have served the needs of the air transport industry for many years.

I. ARINC and ATA

ARINC was formed in 1929 by the airline industry at the suggestion of the Federal Radio Commission (the predecessor of the Federal Communications Commission) for the purpose of promoting the safety of flight by coordinating and assuring effective communications for the air transport industry. Thus, ARINC is a service company owned by the airline industry to

[1]ARINC and ATA also concur in and support generally the Briefs in Opposition submitted by the Government and the other Intervenor-Respondents which further delineate reasons why this Court should not issue a writ of certiorari to the Court of Appeals for the Fourth Circuit in this proceeding.

which it renders communications services on a not-for-profit basis.

The ATA is an association of the nation's scheduled airlines which are substantial users of the services provided by telephone companies as well as the principal users of ARINC's services.

II. The Use of the Telephone System by the Air Transport Industry

The communications services provided by the nation's many telephone companies are essential to safe and efficient air transport operations. In addition to being very substantial users of the switched public telephone system, the air transport industry is the largest non-government user of dedicated private line telephone service, which is provided by the telephone companies using essentially the same plant as is used for the public network. The air tranport industry uses a vast nationwide array of both public and private line communications channels to link together aircraft on the ground and in flight, administrative offices, ticket counters, computer centers, maintenance bases, and parts depots. The services used by the air transport industry include a vast system of private lines, many of which are connected to the basic switched network in order to communicate with the general public, for intercity voice and data communications linking some 3400 city-pairs nationwide, and a network of dedicated telephone lines which connect together a nationwide system of radio stations for communications between the ground and aircraft in flight.

The connection of a wide variety of telecommunications systems and equipment, owned either by indi-

vidual airlines or by ARINC, with lines provided by the telephone companies is essential to the industry's extensive communications operations. The use of such customer-provided terminal equipment is generally referred to as "interconnection."

For example, a private electronic switching system (ESS) established by ARINC and the airlines in 1963, handles the large volume of data relating to such essential information as aircraft dispatch, computerized flight plans, crew scheduling, reservations, and the like. ESS, located in Chicago, is interconnected with telephone company lines to over one thousand points all across the nation.

Similarly, the data terminals employed in connection with airline remote access computers are in large measure provided by the individual airlines and also are interconnected directly with the telephone system.

Air-ground communications service has also been dependent upon direct interconnection for effective operation since the late 1940's. Hundreds of remote aeronautical radio stations, dispersed to provide nationwide air-ground radio communications service, are operated from six ARINC-manned communications centers by means of private lines leased from the common carriers. These telephone lines must be connected directly to the remote radio transmitters and receivers. This interconnected equipment is all owned, operated, and maintained by ARINC and the airlines, and represents an investment of many millions of dollars.

Airline communications management as it has developed over the past quarter century must be handled on a national or regional level to assure that the overall

operations are integrated to the fullest extent practicable. Messages must be transmitted both within states and between states, often over facilities which depend on the interconnection of airline-provided terminal equipment with telephone company-provided communications services. In most cases, there is no feasible method to sort out commingled interstate and intrastate communications for different treatment.

For example, airline reservations offices use interconnected customer-provided automatic call distributors to route calls from the public to the next available agent. One reservations center may be used to serve the entire nation or a multi-state region, so both interstate and intrastate calls are continuously being received. For both operational and economic reasons, the automatic call distributor cannot be connected to receive only interstate or only intrastate calls.

As another example, airline dispatches must be sent with equal ease to aircraft through ARINC's air-ground communications centers regardless of whether the message is to an aircraft in the same state as the communications center or to one flying over a different state.

The sudden emergence in 1973 of state attempts to restrict needed interconnection to the common network would have, if permitted, reversed more than four decades of federal jurisdiction, effectively deprived the air transport industry of existing interconnection, and impeded the expansion of aeronautical telecommunications systems necessary to assure the safety of flight and to serve the traveling public.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. There Are No Special and Important Reasons for Review by This Court

None of the factors identified in Supreme Court Rule 19(1)(b) for federal court of appeals cases meriting review on certiorari are presented here.

First, there is no conflict among the circuits; indeed, the only other circuit to consider the issue presented in this case also affirmed the FCC's interpretation of its jurisdiction. *St. Joseph Telephone & Telegraph Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir. 1975), *aff'g per curiam Department of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973). Moreover, the only state court which has squarely considered the issue has reached the same conclusion as the Fourth Circuit. *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (1975).[2]

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[2] In overturning a Nebraska Public Service Commission order which prohibited interconnection when no state authorization had been obtained, the Supreme Court of Nebraska cogently explained the disruptive effect of such an order:

> If Nebraska or any other state were to bar interconnection of customer-provided equipment for intrastate service in derogation of a federal rule, the telephone common carrier would be placed in the untenable position of having to violate either the state ruling or the federal ruling. If each state were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform, non-discriminatory interstate services throughout the country would be made difficult, if not impossible. Because of the indivisibility of the nationwide telephone network, it is impossible from a practical, economic, and operating standpoint for a telephone common carrier to comply with conflicting federal and state regulations.

Sherdon v. Dann, 193 Neb. 768, 229 N.W.2d 531, 536 (1975).

In addition, the impact on users, such as the air transport industry, whose communications operations were dependent on the ability to interconnect, would have been to create a serious disruption of existing nationwide communications systems and a stifling of future developments.

[3] Exploratory hearings were held Sept. 28-30 by the House Interstate and Foreign Commerce Communications Subcommittee. *See* 42 TELECOMMUNICATIONS REPS. 8-29 (Oct. 4, 1976).

Second, this case does not involve an important question of federal law which should be settled by this Court, but merely an affirmation by the FCC of rulings consistently made for many years. (*See* pp. 8-11 *infra.*) In addition, the propriety of these rulings from a national policy standpoint is now under active consideration by Congress,[3] where legislation has been introduced which would, *inter alia*, establish "that the complete authority to regulate terminal and station equipment used for telephone exchange service shall rest with the States even though such terminal and station equipment also may be used in connection with interstate services." *E.g.*, H.R. 12323, 94th Cong., 2d Sess. (1976).

Third, the decision below was manifestly correct and in harmony with this Court's applicable decisions. (*See* pp. 11-13 *infra.*)

Finally, no question of state law or of judicial procedure is presented.

II. The FCC's Ruling, Affirmed by the Fourth Circuit, Is Consistent with Its Decisions Relating to Interconnection Dating Back Some Thirty Years and Does Not Present Any Questions of Unique Legal Importance.

The FCC's decision in the proceding below merely reiterates and recognizes the holdings of numerous decisions over the past thirty years, that the Commission has regulatory authority over the connection of terminal equipment to telephone plant used for interstate service regardless of the fact that the same plant also provides intrastate service. No novel issues are raised in petitioners' request that this Court suddenly review the FCC's long and consistent interpretation of the Communications Act that state regulation of local telephone service cannot block federal regulation of interstate telephone service.

In addition, over the years users, such as the air transport industry, have come to rely upon a uniform, national interconnection policy, and no purpose would be served by judicial reexamination of the carriers' long-discarded arguments in derogation of federal authority to adopt such policy.

The FCC first confronted and rejected challenges based on Sections 2(b) and 221(b) of the Communications Act to its specific authority over interconnection with facilities used for both interstate and intrastate services thirty years ago in *Use of Recording Devices,* 11 F.C.C. 1033, 1047 (1947).[4] There, the FCC disposed

[4] A similar challenge to FCC jurisdiction over construction of facilities used for both interstate and intrastate service was rejected almost forty years ago in Southwestern Bell Telephone Co., 6 F.C.C. 529 (1938). Despite the fact that less than 10% of the traffic over the new facilities would be interstate, the Commission rejected the telephone company's arguments that Sections 2(b)(1) and 221(b) deprived the Commission of jurisdiction. It held that "if the services and facilities of the carrier are interstate then . . . the Act is applicable." 6 F.C.C. at 534.

of the argument that Sections 2(b)(1) and 221(b) limit its authority over commonly used facilities with the crucial point that "[i]t ignores entirely the basic grant of jurisdiction to this Commission over interstate and foreign communication by wire or radio (see Communications Act, secs. 1 and 2 (a)) . . . ." The Commission also accurately observed that the adoption of a reading of Sections 2(b)(1) and 221(b) antithetical to FCC authority over common facilities, similar to the reading advanced by the petitioners here, would "remove practically all [Bell System] facilities from the jurisdiction of this Commission." *Id.* at 1048 n.12. Significantly, Bell acquiesced in the FCC's assertion of jurisdiction in 1947 and did not seek review.

Repeatedly in the ensuing years, the FCC reaffirmed its authority over common interstate and intrastate facilities.[5] Quite recently, the FCC expressly asserted interstate jurisdiction over a "dial restoration panel" used for both interstate and intrastate communications, and this holding was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Department of Defense* v. *General Telephone Co.*, 38 F.C.C.2d 803, *review denied*, F.C.C. 73-854 (1973), *aff'd per curiam sub nom. St. Joseph Tele-*

[5] Katz v. American Tel. & Tel. Co., 43 F.C.C. 1328 (1953) (telephone facilities); Jordaphone Corp. v. American Tel. & Tel. Co., 18 F.C.C. 644 (1954) (answering devices); American Tel. & Tel. Co. (Railroad Interconnection), 32 F.C.C. 337 (1962) (teletypewriter station equipment); Department of Defense v. American Tel. & Tel. Co., 38 F.C.C.2d 819 (1970) (command post altering network). *See also* Referral of Chastain v. American Tel. & Tel. Co., 43 F.C.C.2d 1079 (1973) (mobile telephone); Fallon Travelodge v. Churchill County Tel. & Tel. Sys., 14 F.C.C.2d 972 (1968) (telephone set and automatic dialer); Hush-A-Phone Corp. v. American Tel. & Tel. Co., 20 F.C.C. 391 (1955) (privacy attachment).

phone & Telegraph Co. v. *FCC,* 505 F.2d 476 (D.C. Cir. 1974).

Because of the FCC's long-standing interpretation of its authority, the decision below has a relatively modest impact on existing services and, thus, gives rise to no need for review by this Court. Certain connections to the telephone have been permitted at least since 1957 under interstate and intrastate tariffs filed by telephone companies in compliance with the FCC's order in *Hush-A-Phone Corp.* v. *American Telephone & Telegraph Co.,* 22 F.C.C. 112 (1957).[6] In 1968, the FCC found unlawful tariff restrictions proscribing direct electrical connection which remained after *Hush-A-Phone* to the extent they prohibited interconnection without regard to whether such interconnection caused actual harm to the telephone network. *Carterfone,* 13 F.C.C.2d 420, *reconsideration denied,* 14 F.C.C.2d 571 (1968). In response to *Carterfone,* the telephone companies filed tariffs allowing the interconnection of customer-provided equipment, but only through a telephone company provided interface device. Pursuant to the liberalized interconnect tariffs filed in response to *Carterfone*, interconnection has been widely avail-

[6] No federal-state conflict developed because the telephone companies, recognizing the need for uniform regulations to govern intrastate use of the telephone instrument, incorporated the same revisions into their state tariffs, and these were accepted by the state regulatory authorities. *See, e.g.,* Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co., 60 P.U.R. 3d 363 (Minn. R.R. & Whse. Comm'n 1964), *aff'd,* Minn. Dist. Ct. 8th Dist., Case No. 8529 (Aug. 17, 1966). In that case, the state commission noted that a new paragraph had been added to its intrastate tariff in order to make the tariff substantially identical to the interstate tariffs filed with the FCC, and went on to hold that the tariff's prohibition of interconnections in that case was reasonable and lawful and consistent with *Hush-A-Phone.*

able to users such as the air transport industry for a number of years under both state and federal tariffs.

The FCC's *Telerent* decision merely clarifies the federal primacy principle already enjoying virtually universal respect in the states. Indeed, the Supreme Court of Nebraska recently acknowledged the preemptive force of the FCC's *Carterfone* decision and overruled one of the state actions that had originally prompted the *Telerent* ruling. *Sherdon* v. *Dann,* 193 Neb. 768, 229 N.W.2d 531 (1975).

In sum, the FCC's authority has been clearly defined for many years and substantial user interests have developed in reliance on FCC policy. The Fourth Circuit merely affirmed the established interpretation of the FCC's authority, and its decision does not merit further review.

III. The Decision of the Fourth Circuit Properly Analyzes the Extent of Federal Jurisdiction Granted to the FCC

The Fourth Circuit correctly rejected the argument that Sections 2(b)(1) and 221(b) of the Communications Act deprive the FCC of authority over facilities used in common for interstate and intrastate service.

Section 2(b)(1) provides only that the Commission shall not have direct regulatory jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service* by wire or radio of any carrier." 47 U.S.C. § 152(b)(1)(1970) (emphasis added). As the Fourth Circuit held, Section 2(b)(1) should be read only to "deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not sub-

stantially affect the conduct or development of interstate communications." 537 F.2d at 793.

Similarly, Section 221(b) denies the Commission jurisdiction only over:

> charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone *exchange service*, or any combination thereof, even though a portion of such *exchange service* constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local governmental authority.

47 U.S.C. § 221(b) (1970) (emphasis added). The court below correctly concluded that this provision merely supplements Section 2(b) by permitting state regulation of strictly local exchange rates and services in a metropolitan area even though the exchange includes more than one state. 537 F.2d at 795.[7]

Petitioners seemingly would like the Court to read into Section 2(b)(1) the Section 221(b) qualification, "even though a portion . . . constitutes interstate or foreign communication." But to the contrary, the omission of this phrase in Section 2(b)(1) serves to underscore the intent of the draftsmen that only purely intrastate matters be exempted from FCC jurisdiction. This Section 221(b) qualification at most merely indicates that Congress knew how to draft broader exceptions, and consciously decided not to do so in Section 2(b). Thus, the only relevance of Section 221(b) to this case is that it supports the Fourth Circuit's interpretation of Section 2(b).

[7] The legislative history supports this limited view of § 221(b). *See* 78 Cong. Rec. 8823 (1934) (remarks of Senator Dill); *see also* S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934); 78 Cong. Rec. 10314 (1934).

Nothing in either of these two provisions evidences the slightest Congressional intent to limit the Commission's jurisdiction over non-exchange interstate or foreign service in cases where facilities are used in common for interstate and intrastate service.

Moreover, the Fourth Circuit observed that the Section 410(c) provision for Federal-State Joint Boards with federal primacy was inconsistent with the purported Congressional design to deprive the FCC of authority over commonly used facilities. 537 F.2d at 794.

Petitioners do not deny that state restrictions on interconnection could make "compliance with both federal and state regulations . . . a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). Consequently, under undisputed principles of federal preemption, the Fourth Circuit's ultimate approval of the FCC's primary authority over interconnection of terminal equipment with the national telephone network was correct and need not be reviewed by this Court. *Id.; Head* v. *New Mexico Board*, 374 U.S. 424 (1963).

CONCLUSION

For the above reasons, certiorari should be denied.

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